## WONG SWEE CHIN v. PUBLIC PROSECUTOR

**[F.C. (Raja Azlan Shah C.J. (Malaya), Syed Othman F.J. & Hashim Yeop A. Sani J.)**
**September 22 & November 14, 1980]**

**[Kuala Lumpur — Federal Court Criminal Appeal No. 21 of 1980]**

*Criminal Law and Procedure — Charges of control and possession of arms and ammunition — Charges under Internal Security Act — Discretion of Public Prosecutor — Whether appellant was conscious when found by police — Finding of fact by trial judge — Failure of defence to cross-examine prosecution witnesses — Whether constituted admission — Evidence of expert witness — Evaluation by trial judge — Admissibility of statements made by appellant to police — Whether voluntary — No threat, inducement or promise — Essential (Security Cases) Regulations, 1975, reg. 21 — Evidence Act, 1950, s. 45 — Internal Security Act, 1964, s. 57.*

*Evidence — Evidence of Experts — Evidence Act, 1950, s. 45.*

In this case the appellant appealed against his conviction on three charges under section 57(1) of the Internal Security Act. It was argued in the appeal (a) that the Attorney-General had exercised his discretion improperly and unlawfully in charging the appellant with offences under the Internal Security Act, 1960; (b) that the trial judge should have found that the appellant was unconscious when the police party found him in the hall of the premises where the gun battle took place; (c) that the trial judge erred in law when he held that the failure of the defence to cross-examine the two prosecution witnesses on the ammunition found in the trouser pockets of the appellant at the time of his arrest constituted a clear admission of the charge of possession by the appellant; (d) that the trial judge erred in law in not adequately evaluating the evidence of the expert witness, the doctor, called for the defence; (e) that the statements purportedly made by the appellant to the police were wrongly admitted in evidence.

**Held:** (1) the Attorney-General had a discretion in the matter and there was no material to show that he had exercised it unlawfully;

(2) the learned trial judge had held that the appellant was conscious when he was found by the police and there was no reason not to accept this finding of the trial judge;

(3) there was a misdirection by the trial judge when he held that the failure of the defence to cross-examine the witnesses on the ammunition found in the trouser pockets of the appellant constituted an admission of the charge of possession by the appellant but this did not affect the correctness of the verdict as the totality of the evidence pointed conclusively to the guilt of the appellant;

(4) it was for the court to assess the evidence of the expert witness and there was no evidence to show that the trial judge had incorrectly or improperly evaluated the evidence;

(5) in this case the trial judge was satisfied that there was no threat, inducement or promise used against the appellant and therefore the statements made by him to the police were rightly admitted in evidence.

*Cases referred to:-*

(1) *Teh Cheng Poh* v. *Public Prosecutor* [1979] 1 M.L.J. 50.

(2) *Watt or Thomas* v. *Thomas* [1947] A.C. 484.

(3) *Owners of Hontestroom* v. *Owners of Sagaporack* [1927] A.C. 37.

(4) *Powell and wife* v. *Streatham Manor Nursing Home* [1935] A.C. 243, 264, 265.

(5) *Transport Ministry* v. *Garry* [1973] 1 N.Z.L.R. 120, 122.

(6) *Johnson Tan Han Seng* v. *Public Prosecutor* [1977] 2 M.L.J. 66.

FEDERAL COURT.

*Jagjit Singh* (*Lee Min Choon* with him) for the appellant.

*T.S. Sambanthamurthi* (Senior Federal Counsel) for the respondent.

*Cur. Adv. Vult.*

**Raja Azlan Shah C.J. (Malaya)** (delivering the judgment of the Court): The appellant was convicted of 3 charges under section 57(1) of the Internal Security Act, 1960, to wit, in control of a 7.65 Walther automatic pistol, a 9 mm Erfurt 96 automatic Luger pistol and a 6.35 Beretta automatic pistol; in control of six rounds of 9 mm ammunition, five rounds of .32 ammunition, and 2 primed hand grenades; and in possession of 35 rounds of 9 mm ammunition, and 29 rounds of .32 ammunition. He put up 25 grounds of appeal some of which overlapped. In our opinion there was no ground whatever upon which the appeal could be allowed. Consequently we dismissed the appeal. We now deal with the main points raised in the petition of appeal.

First, the preliminary objection. It was contended by Mr. Jagjit Singh on behalf of the appellant that the Attorney-General had exercised his discretion improperly and/or unlawfully in charging the accused with offences under the Internal Security Act. He argued that at the worst the appellant was only a common criminal and there was nothing to suggest that this was a case against national security. The short answer can be found in the judgment of the Privy Council in *Teh Cheng Poh* v. *Public Prosecutor*.[1] The accused in *Teh Cheng Poh's* case was also charged under the Internal Security Act, in fact under the same section of the Act (section 57(1) for possession of firearm in a security area). The difference between the two cases lies only in the fact that whereas in *Teh Cheng Poh's* case the accused was found in possession of a revolver and ammunition in the course of a search by a police patrol instituted as a result of a phone call complaining about the robbery, the appellant in the present case was found in possession of arms and ammunitions as described above following a gun battle between a police party and a group of armed men. We feel that what Lord Diplock said in the judgment of the Privy Council in *Teh Cheng Poh's* case provides a complete answer to the preliminary objection raised by the appellant. The Attorney-General had an unfettered discretion in the matter. Lord Diplock at page 56 said:

> "If indeed the Attorney General was possessed of a discretion to choose between prosecuting the appellant for an offence against section 57(1) of the Internal Security Act, 1964, or for an offence under the Arms Act, 1960, and the Firearms (Increased Penalties) Act, 1971, there is no material on which to found an argument that in the instant case he exercised it unlawfully. But, in their Lordships' view, although he had a choice whether to charge the appellant with an offence of unlawful possession of a firearm and ammunition at all instead of proceeding with a charge of armed robbery (which was also brought against the appellant but not proceeded with), once he decided to charge the appellant with unlawful possession of a firearm and ammunition he had no option but to frame the charge under the Internal Security Act, 1960."

The other main point raised on behalf of the appellant which seemed to be also implied in a number of other grounds set out in the memorandum of appeal was that the trial judge should have found that the appellant was unconscious when the police party found him in the hall of the premises where

the gun battle took place. The line of argument was that because of the fact that the appellant sustained not less than seven gunshot wounds and was suffocated by gas fumes from gas shells thrown into the building by the police party, he was in a state of unconsciousness when he was found by the police party. Therefore he cannot be said to be in conscious possession or control of any of the weapons or ammunition supposedly found on him. Looking at the line of defence in the court below it can be seen from the records that the defence took pains to establish that the appellant was either unconscious or at least semi-conscious when he was found. It was for this purpose that the doctor (DW2) was called to explain the medical records of the appellant. We will deal with the nature of this evidence later. Exhibit C53B which was the yellow card forming part of the medical records of the appellant was shown to DW2. In Exhibit C53B a number of informations were recorded of examinations made on the appellant when he was admitted into the ward of the hospital on February 17, 1976 between 1.00 a.m. and 1.35 a.m. (see pages 91-92 of the Appeal Record). The gun battle took place about 8.40 p.m. on February 16, 1976. It is stated in the medical records that on examination, the general condition of the accused was found to be "fair". DW2 stated that there was no mention of any level of consciousness. However, it is significant to note that in Exhibit C53B, DW2 stated that there was "no cyanosis" and that the colour of the blood was not bluish — meaning there was sufficient supply of oxygen (page 98) and nothing abnormal detected according to the records. DW2 also explained that if cyanosis was present then the patient was said to be critical and in this case there was no cyanosis.

It is difficult looking at the records not to accept the finding of the trial judge when he said that he saw no reason why he should not accept the evidence of the two police officers who found the appellant when they said that he was at that time conscious and also asked for a glass of water. In the final analysis it is a question of an appellate court dealing with conclusions of fact made by the court below. In this connection we would like to refer to the judgment of Lord Thankerton in *Watt or Thomas* v. *Thomas*[2] at page 487 as follows: —

"Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion: The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion."

Again in the *Hontestroom* case,[3] Lord Sumner at page 47 had this to say: —

"What then is the real effect on the hearing in a court of appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute: It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. Nonetheless, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the results of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case."

This opinion was adopted by Lord Wright in *Powell and wife* v. *Streatham Manow Nursing Home.*[4]

Mr. Jagjit Singh also raised as one of his main grounds of appeal that the trial judge erred in law when he held that the failure of the defence to cross-examine the two prosecution witnesses on the ammunition actually found in the trouser pockets of the appellant at the time of his arrest (the subject-matter of the third charge) constituted a clear admission of the charge of possession by the appellant. We consider that statement of the law as a misdirection. A correct statement of the law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony, to wit, the fact that they found the ammunition in the appellant's trouser pockets remains unshaken. On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as is common with all general rules there are also exceptions as pointed out in the judgment of the Supreme Court of New Zealand in *Transport Ministry* v. *Garry*[5] where Haslam J. said at page 122: —

"In Phipson on Evidence 11th edition paragraph 1544 the learned authors suggest examples by way of exception to the general principle that failure to cross-examine will amount to an acceptance of the witness's testimony, viz, where

'... the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy ... or when counsel indicates that he is merely abstaining for convenience, e.g., to save time. And where several witnesses are called to the same point it is not always necessary to cross-examine them all.'"

In our view, although there was a misdirection by the trial judge on this point it did not affect the correctness of the verdict as the totality of the evidence points conclusively to the guilt of the appellant.

Another main point raised in the appeal was the contention that the trial judge erred in law in not adequately evaluating the evidence of the doctor, DW2. As referred to earlier, the doctor was called by the defence to explain the medical records of the appellant upon his admission into the hospital immediately following the arrest.

In the Evidence Act, 1950, opinion of experts are under certain conditions admissible in evidence. Who are experts are explained in section 45 of the Act. Section 46 provides that facts not otherwise relevant are relevant if they support or are inconsistent with the opinions of experts when such opinions are relevant. DW2 was called as an expert witness. Our system of jurisprudence does not generally speaking, remit the determination of dispute to experts. Some questions are left to the robust good sense of a jury. Others are resolved by the conventional wisdom of a judge sitting alone. In the course of elucidating disputed questions, aids in the form of expert

opinions are in appropriate cases placed before juries or judges. But, except on purely scientific issues, expert evidence is to be used by the court for the purpose of assisting rather than compelling the formulation of the ultimate judgments. In the ultimate analysis it is the tribunal of fact, whether it be a judge or jury, which is required to weigh all the evidence and determine the probabilities. It cannot transfer this task to the expert witness, the court must come to its own opinion. Therefore the nature of DW2's evidence must be examined in the light of the above principles. We see nowhere in the records to suggest that the trial judge had incorrectly or improperly evaluated the evidence of DW2.

Finally, the question of the admissibility of the statements purportedly made by the appellant to the police officer, PW6, at the time of his arrest. It was argued that the trial judge erred in law in failing to direct his mind to the issue as to whether the statements, if in fact made were made voluntarily without threat, promise or inducement. As can be seen there are two sides to the question. First, it was the appellant's contention all along that he never made those statements because he was unconscious. This however was not accepted by the trial judge. The trial judge found that he was conscious and that he made the statements. The statements appear in the evidence of PW6 and corroborated by PW7. The trial judge accepted the evidence of these police officers and found that the appellant did make the statements and his finding was recorded in his judgement at page 220 as follows: —

"The accused said to Supt. Selvanayagam in the presence and hearing of ASP Ghazali:

(a) that the Walther 7.65 automatic pistol (P23) found near the left hand finger-tips of the accused was the pistol he had robbed from Detective Hudson Ng (P.W.8);

(b) that the Luger pistol (P32) and two hand-grenades (P37 and P38) were bought in Siam;

(c) that the Beretta 6.35 Mod 950B automatic pistol (P35) was given to him by a friend.

(see pages 37G-38A, 39B-C of Notes of Evidence).

The foregoing evidence is admissible under Regulation 21(1)(a) of the Essential (Security Cases) (Amendment) Regulations, 1975."

As clearly implied in the grounds of appeal the defence was in the alternative, i.e., it was denied that the statements were ever made and alternatively, if they were made, they should not have been admitted by the trial judge because the circumstances indicate that the statements were not made voluntarily.

The trial judge expressly referred to the admission of the statements by virtue of regulation 21(1)(a) of the Essential (Security Cases) Regulations 1975. This was a trial under the security regulations. Regulation 21 of the Regulations provides that a statement made by an accused person whether orally or in writing shall be admissible notwithstanding that such statement was made in the circumstances described in sub-paragraphs (a) to (i) of paragraph (1). Sub-paragraph (a) says that such statement shall be admissible notwithstanding that it was made to or in the hearing of a police officer provided that the police officer is not below the rank of an Inspector.

The absence of any reference to his finding on the voluntariness of the statements and the absence of any reference to *Johnson Tan Han Seng* v. *Public Prosecutor*[6] would not be sufficient grounds for us to conclude that the trial judge failed to consider the question of voluntariness. In fact if one looks at the judgment of the trial judge it is little wonder that he was not so much concerned with the allegation of threat, promise or inducement held out to the appellant but rather with the threats held out by the appellant to the police personnel. The trial judge dealt specifically with these threats. It was in evidence that the appellant when found after the gun battle, was boisterous and his conduct would seem to indicate aggressiveness rather than fear. When asked who owned the Walther pistol, the appellant replied "Saya punya." and then said "Saya dua tangan sudah jammed kalau tidak saya sudah tembak lu." (page 53 of the record). Thus looking at the judgment of the trial judge on this issue it seems clear to us that the trial judge was in fact satisfied that there was no threat, inducement or promise used against the appellant but that it was the appellant who issued threats to his captors in a classic show of bravado.

We are therefore of the view that the statements were correctly admitted by the trial judge.

*Appeal dismissed.*

Solicitors: *Jagjit Singh & Co.*

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## DIRECTOR-GENERAL OF INLAND REVENUE v. KULIM RUBBER PLANTATIONS LTD.

**[F.C. (Suffian L.P., Wan Suleiman & Chang Min Tat F.JJ.) October 29 & November 25, 1980]**

**[Kuala Lumpur — Federal Court Civil Appeal No. 88 of 1979]**

*Revenue Law — Income Tax — Deductions — Sale of rubber estates — Compensation paid to estate agents and secretaries — Whether allowable deductions — Outgoings and expenses incurred in production of income — Appeal from Special Commissioners — Question of law — Income Tax Act, 1964, s. 14.*

*Precedent — English, Australian and New Zealand authorities on income tax — Whether relevant.*

This was an appeal from the decision of the High Court reported in [1979] 2 M.L.J. 298. The question raised in the appeal was whether the payments paid to the agents and secretaries, who were employed in the conduct of the business of the respondents, as compensation on the sale of certain rubber estates, were deductible as being outgoings and expenses incurred in the production of income. The Special Commissioners had held the expenses were not deductible as they were capital expenditure but on appeal Vohrah J. held that the expenses were deductible. The appellant appealed.

**Held:** (1) the respondents were bound by contract to pay compensation for the loss in remuneration arising from the diminution in the total acreage of its holdings and had to pay this compensation in order to retain the services of the existing agents both in London and in Malaysia. The compensation could rightly be regarded as a sum paid to the agents redeeming by arrangement their future emoluments which would have been in each year attributable to revenue;

(2) where a company, in order to get rid of a contract which is of an onerous character or a servant whose continuance in service is undesirable in the company's interest, makes a payment in such circumstances it is properly to be treated as a revenue payment and a deductible expense;